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August 19, 2019

Ex Parte Notice

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)*, WC Docket No. 19-44

I write on behalf of AT&T in response to the Districts' July 23, 2019 Ex Parte letter. Nothing in the Districts' latest letter contradicts the showing by AT&T and other telephone companies that the Commission should interpret § 615a-1(f)(1) to preempt any state statutes that facially discriminate against VoIP service, such as by using a different counting rule for VoIP (telephone numbers) than for traditional services (concurrent calling capacity), or by applying caps on the total charges due only from customers buying traditional services.

The Districts do not offer any arguments based on the text of § 615a-1(f)(1). Rather, they offer a parade of horribles that supposedly would arise when applying state regimes that calculate the 911 charges due from VoIP customers based on concurrent outbound calling capability to large business customers. Yet they ignore that state after state has enacted explicit statutory language setting the 911 charges due from VoIP customers based on their concurrent outbound calling capability. And they provide no evidence that any of the supposed parade of horribles has actually come to pass in any of those states. Nor would any of their hypothetical concerns justify the Commission endorsing the Districts' extremely narrow reading of § 615a-1(f)(1), under which it ensures parity only in the 911 charge rate, without regard to the total number of charges due from a customer.

AT&T and other telephone companies also showed that resolving the dispute about the meaning of § 615a-1(f)(1) moots any disagreements about the meaning of the Commission's definition of interconnected VoIP in 47 C.F.R. § 9.3. The Districts notably do not deny that they, and the plaintiffs in other litigation, seek to reclassify services as interconnected VoIP solely to claim that more 911 charges were due from those customers as a result of that reclassification. A Commission ruling that such discrimination against VoIP customers is unlawful would moot all disputes over whether any service is "really" interconnected VoIP for purposes of calculating the 911 charges due. And we showed further, and the Districts again do not dispute, that the Commission has resolved past primary jurisdiction referrals by declining to resolve mooted issues, and it could properly do so here as well.

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But if the Commission elects also to clarify the meaning of § 9.3, it need go no further than reaffirming that voice services that are transmitted over the last mile in formats *other than* IP are *not* interconnected VoIP. That simple, bright line rule — which the Districts, at least, no longer dispute — follows directly from prior Commission rulings and provides a simple way for providers and customers to know when they are not purchasing interconnected VoIP services. It also fully addresses the Alabama Action, where the Districts allege that BellSouth's ISDN PRI service was "really" interconnected VoIP. Yet BellSouth transmitted that PRI service, which it sold from its Alabama Guidebook (following state detariffing), in TDM (and not IP) over the last mile. Indeed, as we have long explained, BellSouth did not offer *any* business voice services in Alabama during the relevant time period that transmitted voice communications in IP over the last mile.

I. The Districts' Arguments for Permitting States to Impose Discriminatory 911 Charges Are Unpersuasive

A. The Districts' Position Would Allow States To Discriminate Against VoIP Customers, in Violation of § 615a-1(f)(1)

The Districts urge the Commission to hold that states may impose discriminatory 911 charges on VoIP customers, so long as the discrimination takes the form of an increased *total number* of charges rather than an increased *rate per charge*.[1] That interpretation cannot be squared with the text or purpose of § 615a-1(f)(1), and the Districts offer no persuasive argument to the contrary.

The Districts and other plaintiffs in similar 911 litigation have argued that state statutes can lawfully impose two forms of discriminatory 911 charges on VoIP customers: (1) imposing 911 charges on non-VoIP customers by simultaneous calling capacity and on VoIP customers by telephone number, or (2) capping 911 charges on non-VoIP customers, but not applying that cap to VoIP customers.[2] AT&T has shown that these discriminatory rules can increase customers' monthly phone bills by hundreds of dollars when they switch from a non-VoIP service to a VoIP service, even though they are purchasing the same quantity of service.[3] Indeed, it is common for BellSouth's PRI customers to replace their PRI circuits with AT&T Corp.'s IP Flexible Reach service, and to purchase the same 23 concurrent calls using that VoIP service as they had been using with their PRI. The Districts and other plaintiffs thus claim it is lawful for that simple change in technology to result in a massive increase in that customer's total 911 charge payments.

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[1] *See* Districts July 23, 2019 *Ex Parte* at 11.

[2] AT&T May 13, 2019 *Ex Parte* at 1-2.

[3] *See* BellSouth Pet. 24 (giving example of Alabama customer whose monthly 911 charges, under the Districts' view of the law, would increase from $116.84 to $508.00 if it switched from an ISDN PRI with 23 voice channels and 100 telephone numbers to VoIP service with equivalent capacity); AT&T Comments 16 (noting that South Carolina 911 plaintiffs have argued that they can impose thousands of 911 charges on VoIP customers, even though non-VoIP 911 charges are subject to a statutory cap of 50 charges).

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Such discrimination would run afoul of the plain text of § 615a-1(f)(1), which states that "the fee or charge" on interconnected VoIP service "may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications service." 47 U.S.C. § 615a-1(f)(1). Simply put, customers who must pay more money in 911 charges pay a higher "amount," regardless of whether that discrimination is accomplished through a higher rate per charge (which the Districts concede § 615a-1(f)(1) preempts) or through a higher total number of charges.

Nor can the Districts' interpretation be squared with the federal communications policy that § 615a-1(f)(1) embodies. As we have explained, and the Districts have not disputed, the purpose of the preemption provision (and a core tenet of federal communications policy that runs across many statutes and regulations) is encouraging the development and deployment of IP-based communications technologies such as interconnected VoIP.[4] A 911 charge statute that would impose a monthly tax increase of hundreds or thousands of dollars on a customer who switches from non-VoIP service to VoIP service would have precisely the opposite effect.[5]

The Districts assert (at 11-12) that a handful of states already impose discriminatory 911 charges against VoIP customers, citing the Alabama statute that was repealed in 2013, as well as statutes in South Carolina, Florida, and Idaho. But in claiming that the old Alabama statute required VoIP customers to pay 911 charges by telephone numbers, the Districts ignore that they litigated — *and lost* — this question before an Alabama state court. That court specifically held that Alabama's prior 911 law required both VoIP and non-VoIP customers to pay 911 charges based on the extent to which a customer "can simultaneously access E911 services."[6] And the

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[4] *See* BellSouth Pet. 25-26; AT&T Comments 16-19; AT&T Reply Comments 5.

[5] The Districts' *Ex Parte* includes a lengthy digression (at 2-5) rebutting an argument they erroneously attribute to BellSouth — "that Section 615a-1 allows states to impose 911 fees *only* on [interconnected VoIP] services" — and urging the Commission to declare that the Districts can impose 911 charges on "similar services" to VoIP. As AT&T previously explained, the Districts have misconstrued BellSouth's arguments. BellSouth has never argued that the Districts only have authority to impose 911 charges on interconnected VoIP service; rather, BellSouth and AT&T have made the limited argument that, "*[f]or VoIP service*, the law is clear that states can regulate only to the extent the Commission specifically permits." AT&T Comments 20 (emphasis added). Further, AT&T has previously explained that the Commission should not address 911 billing obligations on "similar services" to VoIP under Alabama's prior 911 statute because that is a matter for the district court, which has already *rejected* the Districts' interpretation of the Alabama statute by holding that "the statutory phrase 'VoIP or similar service' 'must be read' to mirror the Commission's definition of interconnected VoIP." AT&T Reply Comments 4 (quoting Primary Jurisdiction Referral Order at 10-11 (Dkt. 52)).

[6] Order at 18, *Madison County Communications Dist. v. ITC DeltaCom, Inc.*, CV 2014904855.00 (Ala. Cir. Ct. Jefferson Cty. Apr. 25, 2018). The Districts settled shortly after the court issued this decision.

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current Alabama 911 law undisputedly uses the number of concurrent outbound calls that can be placed to calculate the 911 charges due from VoIP and non-VoIP customers.[7]

None of the other three state laws the Districts cite explicitly requires VoIP customers to pay 911 charges by telephone number, without regard to the customer's concurrent calling capability. The South Carolina and Idaho statutes look to "outbound calling capability" — not merely telephone numbers — in setting the 911 charges that are due from VoIP customers.[8] In Florida, the same statutory provision sets the 911 charges due from both VoIP customers and standard exchange access customers; there is no basis for reading that uniform language statute to adopt different counting rules for 911 charges based on the service a customer purchased.[9] In all events, the meaning of the South Carolina and Florida statutes are at issue in the cases pending in those states, and the Commission's interpretation of § 615a-1(f)(1) will guide those courts in resolving the meaning of those statutes.[10]

The Districts' argument (at 12-13) that preemption in this context requires a "clear statement" is incorrect and misreads the relevant case law. It is also inconsistent with their concession that § 615a-1(f)(1) preempts states from setting a higher per charge 911 rate for VoIP customers. The clear statement rule they cite applies only to preemption of state authority over "decision[s] of the most fundamental sort for a sovereign entity," such as requirements for service as a state court judge. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Here, the issue is preemption of state law regulating VoIP services, which is an area the Commission and federal courts have long recognized is one for federal law and the Commission. *See Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 718-20 (8th Cir. 2018); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d

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[7] *See* Ala. Code § 11-98-5(a) (2013) (providing that "[a] single, monthly statewide 911 charge shall be imposed on each active voice communications service connection in Alabama that is technically capable of accessing a 911 system"); *see also* Ala. 911 Board Rule 585-X-4.01 (clarifying that the same method of counting active voice communications service connections — "the number of channels configured for or capable of accessing a 9-1-1 system" — applies to both VoIP and non-VoIP services).

[8] *See* S.C. Code § 23-47-10(38) (defining "VoIP service line" as "a VoIP service that offers an active telephone number . . . that has outbound calling capability"); Idaho Code § 31-4802(12) (defining "Interconnected VoIP service line" as an interconnected VoIP service that offers an active telephone number, that has an "outbound calling capability of directly accessing a public safety answering point"). Because all interconnected VoIP services — by definition — include the ability to make outbound calls, that additional statutory language is best understood to refer to the number of concurrent outbound calls the customer can make.

[9] *See* Fla. Stat. 365.172(8)(a)(l) (imposing a 911 charge on subscribers to both VoIP and non-VoIP services "on the number of access lines having access to the E911 system, on a service-identifier basis"); *id.* § 365.172(3)(aa) (defining "service identifier" as "the service number, access line, or other unique identifier assigned to a subscriber and established by the Federal Communications Commission for purposes of routing calls whereby the subscriber has access to the E911 system").

[10] AT&T May 13, 2019 *Ex Parte* at 2-3.

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570, 580-81 (8th Cir. 2007). No clear statement rule applies here. In all events, § 615a-1(f)(1) clearly reflects Congress's intent to preempt state laws that violate the non-discrimination rule it establishes.

B. The Districts' Parade of Horribles Does Not Exist and Could Not Justify Allowing Wholesale Discrimination

1. The Districts' latest Ex Parte contains no argument regarding the words of § 615a-1(f)(1) or even an attempted policy justification for allowing states to discriminate against VoIP customers. Instead, the Districts essentially urge the Commission to throw up its hands and give up on preventing discrimination against VoIP customers because the capabilities of VoIP services sold to larger enterprise customers purportedly make it too difficult to implement uniform, nondiscriminatory 911 charge rules that apply to VoIP and non-VoIP customers.

The Districts' unfounded and hyperbolic assertions that "assessing 911 fees . . . by call capacity or concurrent call capacity" is "impractical," would "lead to absurd outcomes," and "would throw 911 funding into chaos,"[11] are refuted by the states' actual experience. Numerous states have enacted 911 billing statutes that explicitly bill VoIP and non-VoIP customers by calling capacity, and there is no evidence that any has experienced the problems the Districts predict.

As early as 2006, the Tennessee Emergency Communications Board concluded that VoIP customers should pay 911 charges "on all circuits or capacity by which the account may simultaneously transmit a telephone call to a public safety answering point, which otherwise may be understood to be the account's concurrent call volume or the account's capacity for making simultaneous calls."[12] Since then, state after state has enacted 911 laws that unambiguously require VoIP customers to pay 911 charges based on concurrent calling capacity. We noted three such states — Alabama (2013), Pennsylvania (2015), and Georgia (2019) — in our May 13, 2019 ex parte letter (at 2-3), but they are far from alone. In statutory language that took effect in 2012, Kansas decided to impose 911 charges based on the "maximum capacity of the simultaneous

[11] Districts July 23, 2019 *Ex Parte* at 5-6, 11.

[12] TECB Annual Report Fiscal Year 2006-2007, p. 10, *available at* https://www.tn.gov/content/dam/tn/commerce/documents/e911/posts/TECB_Annual-Report_FY-2007.pdf.

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outbound calling capability" of a VoIP service.[13] Maryland (2019),[14] Montana (2018),[15] Missouri (2018),[16] New Mexico (2017),[17] North Carolina (2018),[18] and South Dakota (2008)[19]

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[13] *See* Kan. Stat. Ann. § 12-5369 (imposing a 911 fee per "subscriber account"); *id.* § 12-5363(t) (defining "Subscriber account" as "the 10-digit access number assigned to a service user by a provider for the purpose of *billing a service user up to the maximum capacity of the simultaneous outbound calling capability* of a multi-line telephone system or equivalent service") (emphasis added); *id*. § 12-5363(i) (defining "Multi-line telephone system" as "includ[ing] VoIP service").

[14] Md. Public Safety Code § 1-310(c)(1) (imposing a 911 charge on each "9-1-1 accessible service provided"); *id.* § 1-310(c)(2) (providing that "if a service provider provisions to the same individual or person the voice channel capacity to make more than one simultaneous outbound call from a 9-1-1 accessible service, each separate outbound call voice channel capacity, regardless of the technology, shall constitute a separate 9-1-1 accessible service for purposes of calculating the 9-1-1 fee due").

[15] Mont. Code Ann. § 10-4-201(1)(a) (imposing a 911 charge "per access line"); *id.* § 10-4-101(2) (defining "[a]ccess line" as "a voice service of a provider of exchange access services, a wireless provider, or a provider of interconnected voice over IP service that has enabled and activated service for its subscriber to contact a public safety answering point via a 9-1-1 system by entering or dialing the digits 9-1-1. When the service has the capacity, as enabled and activated by a provider, to make more than one simultaneous outbound 9-1-1 call, then *each separate simultaneous outbound call, voice channel, or other capacity constitutes a separate access line*.") (emphasis added).

[16] Mo. Ann. Stat. § 190.455(1) (authorizing a 911 charge "based upon the number of active telephone numbers, or their functional equivalents or successors, assigned by the provider and *capable of simultaneously contacting the public safety answering point*; provided that, for multiline telephone systems and for facilities provisioned with capacity greater than a voice-capable grade channel or its equivalent, regardless of technology, the charge shall be assessed on the number of voice-capable grade channels as provisioned by the provider that *allow simultaneous contact* with the public safety answering point") (emphases added).

[17] N.M. Stat. Ann. § 63-9D-5(A) (imposing a 911 charge "on the number of VoIP lines for which the VoIP service provider enables the capacity for simultaneous calls, regardless of actual usage").

[18] N.C. Gen. Stat. Ann. § 143B-1403(a) (imposing a 911 charge based on the "total number of simultaneous outbound 911 calls the subscriber can make using the North Carolina telephone numbers or trunks billed to their account").

[19] S.D. Codified Laws § 34-45-4 (imposing a 911 charge "per service user line"); *id.* § 34-45-1(21) (defining "[s]ervice user line" as "the means by which a service user may place a call to a public safety answering point through the use of a telecommunications service, wireless telecommunications service, or Interconnected Voice over Internet Protocol service. In the case of multi-station network systems, service user lines shall be equal to *the number of calls that can*

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have all done the same. And, as of January 1, 2020, an additional forty million Americans will live in a state that bills 911 charges to VoIP customers based on concurrent call capability. California recently amended its 911 law so that "[t]he number of surcharges imposed shall not exceed the total number of concurrent outbound calls that can be placed to the emergency communications system at a single point of time."[20] Thus, billing VoIP in a non-discriminatory fashion based on concurrent call capability is far from an impractical "concept manufactured by BellSouth"[21] that will lead to chaos as the Districts argue; it is time-tested and endorsed in states throughout the nation.

2. The specific concerns the Districts raise regarding implementation of nondiscriminatory billing rules are limited to very large business and VoIP providers that have elected to sell their VoIP service on a per-minute basis. These concerns are also exaggerated.

As AT&T and other telephone companies showed by citing and quoting the service guides for their VoIP products, many VoIP providers "sell VoIP services that provide business customers the ability to make a limited number of simultaneous calls to the PSTN (including 911)."[22] The Districts offer no facts to dispute this, but merely speculate (at 10) that it "may or may not" be true. For VoIP customers who purchase a set amount of simultaneous calling capacity, it is simple to apply a nondiscriminatory rule that imposes 911 charges according to calling capacity.

The Districts attach numerous exhibits to their submission, which they say show that VoIP is not "similarly situated" to traditional telephone service.[23] None of these exhibits refutes the fact, shown by states' actual experience, that it is feasible for states to enact and implement nondiscriminatory 911 charge billing regimes.

Exhibits A and B are excerpts of product descriptions of VoIP services offered by Verizon and AT&T Corp., respectively (note that AT&T Corp. is a distinct corporate entity from BellSouth, and is not a party in the Alabama Action). Both products provide the ability for larger business customers to share their total quantity of purchased outbound calling capacity across multiple locations. Exhibit A describes a feature of Verizon's VoIP service whereby a customer "will be able to share the total simultaneous calling capacity purchased by Customer across its enterprise on a regional basis."[24] Exhibit B describes a "[b]ursting and sharing" feature of AT&T Corp.'s IP Flexible Reach product whereby customers can "go beyond the maximum number allowed on the

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simultaneously be made from such system to the public switched telephone network") (emphasis added).

[20] Cal Rev. & Tax Code § 41020.5(b)(2) (effective Jan. 1, 2020).

[21] Districts July 23, 2019 *Ex Parte* at 11.

[22] AT&T, CenturyLink, and Verizon July 11, 2019 *Ex Parte* at 1.

[23] The Districts, however, do not respond to our showing that the exhibits included with their last ex parte and reply comments do not support their claims. *See id.* at 2-3.

[24] Districts' July 23, 2019 *Ex Parte*, Ex. A, at 1.

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trunk to borrow call capacity from another . . . trunk group within your enterprise."[25] This feature does not allow customers to exceed the total amount of simultaneous calling capacity the customer purchases; it only provides for sharing that capacity across multiple locations.

As AT&T and other telephone companies previously explained, and the Districts have not disputed, the ability for telephone customers to share capacity across locations is not unique to VoIP and has existed in some form since at least 1984.[26] Even if VoIP makes such sharing easier, that does not justify resorting to a telephone number method for 911 billing. Indeed, state statutes can and do take such sharing into account with non-discriminatory solutions. For example, Maryland's recently enacted 911 statute specifies that, when a "telephone service . . . provides, to multiple locations, shared simultaneous outbound voice channel capacity configured to provide local dial in different states, the voice channel capacity to which the 9-1-1 fee due under [the Act] applies is only the portion of the shared voice channel capacity in the State identified by the service supplier's books and records."[27] It then sets forth specific factors that a service supplier may rely on in determining the portion of shared capacity in the State.[28]

Verizon also offers VoIP customers an optional feature, which is to pay more for the ability to make a number of simultaneous calls that is approximately 20% greater than the baseline amount of calling capacity purchased.[29] But the Districts do not contend that, when a customer uses this additional capacity, Verizon fails to charge the customer for the additional capacity (whether in 911 charges, USF fees, or any other charges that normally increase when a customer purchases a greater quantity of service). Again, nothing about this offering renders non-discriminatory 911 charge billing for VoIP and non-VoIP services an impossibility, as the Districts claim.

Exhibits C and D merely describe an option whereby a VoIP customer can ensure 911 access even where it has maxed out its calling capacity by purchasing additional lines dedicated to 911 service.[30] Clearly, if a customer purchases a dedicated line for 911 calls, nothing about § 615a-1(f)(1) prevents a state from adopting a statute that imposes a 911 charge on that line.

Exhibits E through H are product descriptions for nomadic VoIP products that are sold on a per minute basis, rather than a concurrent calling capacity basis. Nothing about § 615a-1(f)(1) would prevent a state from using a proxy formula to translate those services into units of concurrent

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[25] *Id.* Ex. B, at 196.

[26] July 11, 2019 AT&T et al. *Ex Parte*, at 2 and n.6.

[27] Md. Public Safety Code § 1-310(c)(5)(i).

[28] *Id.* § 1-310(c)(5)(ii).

[29] Districts' July 23, 2019 *Ex Parte*, at 6 & Ex. A at 10 (describing BEST+).

[30] *See id.*, Ex. C, at 15–18 ("As an example, we can point emergency calls to a PRI trunk group, with an alternate path (reserved exclusively for emergency calls) to POTS lines for overflow conditions."); Ex. D, at 1-2 ("[T]he call will not go through if all channels are being used. So on SIPTRUNK.com you'll need to pick at least l enhanced DID per physical location. . . . We have instructions on how to setup an enhanced DID for e911.").

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calling capability for purposes of 911 charge billing, similar to the rule in Texas.[31] Again, such products present only an implementation issue for nondiscriminatory billing rules, not a justification for allowing discrimination. Notably, none of these providers has been sued in any of the pending 911 litigation.

Finally, the Districts' belated reliance on a handful of VoIP providers that bill for VoIP service on a per minute basis again shows that the Districts and their *qui tam* relator consultant are simply casting about for any argument that might entitle them to the contingency fee windfall they seek. The Districts have long argued that it is necessary to impose 911 charges on VoIP customers by telephone number so that those customers *pay more* than traditional telephone customers, given the supposed "much higher theoretical maximum burden on the 911 system" that VoIP services impose.[32] But now, to justify their per-telephone-number billing rule, they rely on VoIP products that allow for more concurrent calls than telephone numbers — including a Telzio product that purportedly allows "unlimited concurrent calls" on "a single Telzio phone number."[33] Yet that Telzio customer would pay only a single 911 charge: a result entirely at odds with the entire theory of increased burdens underlying the Districts' position. Their apparent acceptance of that consequence demonstrates that their interpretation of § 615a-1(f)(1) — like their interpretation of § 9.3 — is simply a ploy to obtain damages in litigation.

II. A Declaratory Ruling that Section 615a-1 Preempts State Laws that Impose More 911 Charges on Interconnected VoIP Customers than the Same Class of Traditional Telephone Customers Would Resolve the Parties' Controversy

A. The Commission Need Not Address the Definition of Interconnected VoIP

The Districts urge the Commission (at 1-2) to address the definition of interconnected VoIP as well as the parties' dispute regarding § 615a-1(f)(1). But the Districts do not deny that the only reason they have advanced their novel interpretation of the Commission's definition of interconnected VoIP is to increase the available monetary damages in the Alabama Action based on their claim that customers would have owed — and, therefore, that BellSouth is liable for — far more 911 charges if their services were re-classified as VoIP.

However, under the correct interpretation of § 615a-1(f)(1), federal law preempts the Districts' entire damages theory. If the Commission agrees with BellSouth, it will not matter for purposes of the Alabama Action whether BellSouth's ISDN PRI service in Alabama was "really"

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[31] *See* Texas 911 Entities Comments 7 (quoting Texas Administrative Code Rule 255.4, which states that "[a] service provider using one or more facilities with multiple calling capabilities to serve a single end user customer location that cannot determine the actual number of local exchange access lines or equivalent local exchange access lines being served by such facilities (e.g., Enterprise Voice over Internet Protocol applications), shall assess the 9-1-1 emergency service fee as follows," according to a mathematical proxy formula).

[32] Districts' Petition 39.

[33] Districts' July 23, 2019 *Ex Parte* at 9.

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interconnected VoIP (as the Districts allege), because those customers would not have owed any more 911 charges even if their PRI services were deemed to have been interconnected VoIP.

None of the Districts' arguments demonstrate a need for the Commission to address the interconnected VoIP definition once it properly interprets § 615a-1(f)(1) to preempt state discrimination against VoIP customers. The Districts argue (at 2) that the District Court needs "a meaningful definition of 'IVoIP'" to determine "whether undue discrimination exists." But if the Commission rules for BellSouth on the preemption issue, the discrimination question will be assessed by a review of the statutory language, not the characteristics of particular services. In addition, the 911 charges due from a customer will not change, regardless of whether the District Court decides, for example, that BellSouth's ISDN PRI service is (or is not) "really" VoIP.

The Districts further argue (at 2) that addressing only the interpretation of § 615(a)-1(f)(1) could lead to further delay if a court disagrees with the Commission's interpretation. But they do not dispute that, in other declaratory ruling cases, the Commission has declined to address mooted issues without creating any additional delay.[34] Nor is there any reason to think that a court would reject the Commission's interpretation of § 615a-1(f)(1). The Commission's interpretation of a statute it administers is entitled to deference,[35] and the interpretation that precludes all state discrimination against VoIP customers in the context of 911 charges — not merely discrimination in the rate per charge — is plainly reasonable.

B. If the Commission Addresses the Interconnected VoIP Definition, It Need Do No More Than Reaffirm that a Voice Service Must Be Transmitted Over the Last Mile in IP to Be Interconnected VoIP

If the Commission decides to address the definition of interconnected VoIP, it should reaffirm that a service must be transmitted over the last mile in IP to qualify as interconnected VoIP. Such a ruling is consistent with well-established principles. *First*, the name "Voice over Internet Protocol" literally requires that VoIP involve voice communications transmitted over internet protocol. *Second*, the Commission has always understood interconnected VoIP to be a type of "IP-enabled service."[36] A service that does not use IP to deliver voice to the customer's premises is not IP-enabled. *Third*, the Commission's definition of interconnected VoIP, which includes only services that "[r]equires Internet protocol-compatible customer premises equipment,"[37] confirms that interconnected VoIP must be delivered to the customer's premises in

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[34] *See, e.g.*, Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002) (resolving a primary jurisdiction referral by addressing the first question referred but declining to address the second).

[35] *See Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007).

[36] *See, e.g.*, First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services and 911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, ¶ 23 (2005).

[37] 47 C.F.R. § 9.3.

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IP. A service that transmits voice communications in another format (such as TDM) does not *require* IP-compatible CPE under any reasonable construction of the word "require." Finally, although the Districts disputed the issue in the District Court, they now *agree* that transmission of voice in IP over the last mile is a necessary requirement for a service to qualify as interconnected VoIP.[38]

A declaratory ruling confirming this bright-line rule, in conjunction with the interpretation of § 615a-1(f)(1) discussed above, would be more than enough to resolve the primary jurisdiction referrals. For 911 and other purposes, BellSouth and other AT&T companies classify all services that use IP to transmit voice over the last mile as VoIP. They classify services that transmit voice over the last mile in formats other than IP — such as the BellSouth ISDN PRI service at issue in the Alabama Action — as non-VoIP. Thus, a ruling that only voice services transmitted in IP over the last mile can be VoIP would dispose of the "VoIP misclassification" claims against BellSouth and the AT&T companies.

During the relevant period in the Alabama Action (before October 1, 2013), BellSouth did not offer any business voice services in Alabama that transmitted voice over the last mile in IP. BellSouth has repeatedly informed the Districts and the Commission that its business voice service offered in Alabama during the relevant period, such as its ISDN PRI service, was transmitted over the last mile in TDM, and not IP. The Districts have asserted that they do not believe BellSouth, but despite repeated efforts have not offered any facts that actually support their supposition that BellSouth is lying.[39]

In fact, BellSouth offered its ISDN PRI service through state tariffs and then, when states detariffed those services, through guidebooks. BellSouth's guidebook for its ISDN PRI service in Alabama makes clear that this is a TDM service. For example, the guidebook states that "Primary Rate ISDN provides an *ISDN based, DS1 access* to the telecommunications network" and "provide[s] connectivity between *ISDN compatible CPE* and a serving central office."[40] And even where B-channels on a PRI are used to transmit digital data, that data "will be circuit switched at 64 Kbps within the switch and between ISDN compatible central offices,"[41] not packet switched using internet protocol.

While BellSouth did not offer business VoIP service during the period at issue in the Alabama Action, AT&T Corp. did (and does) offer a business VoIP service called IP Flexible Reach. AT&T Corp. treats this service as a VoIP service for 911 and other purposes. This service was never offered through a tariff, and AT&T Corp. never submitted a § 214 application when

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[38] Districts' Comments 3.

[39] *See* BellSouth Pet. 5, 13 & n.18; AT&T Comments 4 & n.3; AT&T Reply Comments 3 & n.4.

[40] BellSouth (d/b/a AT&T Alabama), General Exchange Guidebook, A42.3.1.B (emphases added), *available at* http://cpr.att.com/pdf/al/g042.pdf.; *see also id.* at A42.3.1.O ("Digital Data Transmission on the B-Channel").

[41] *Id.* at A42.3.1.O.

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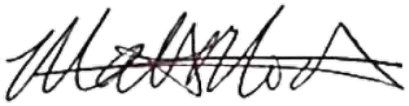
discontinuing any VoIP service prior to 2009, when the Commission extended § 214 obligations to interconnected VoIP services.[42]

As before, we continue to urge the Commission to address this matter promptly with a declaratory ruling affirming that § 615a-1(f)(1) preempts any state 911 statutes that facially discriminate against VoIP service.

Sincerely,



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Cc: Terri Natoli
Erika Olsen
Pamela Arluk
Michelle Berlove
Elizabeth Cuttner
Michael Ray

[42] *See* Report and Order, *IP-Enabled Services*, 24 FCC Rcd 6039 (2009).